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Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Suite TW-A325
Washington, DC 20554

Re: Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies, MM Docket No. 98-204

Dear Ms. Dortch:

On behalf of the State Broadcast Associations on whose behalf this firm filed Joint Comments and Joint Reply Comments (the "State Associations"), we hereby respond to the *ex parte* filing dated October 1, 2002, on behalf of the Minority Media and Telecommunications Council and 47 other organizations ("MMTC").

The MMTC's voluminous filing is inaccurate – indeed wildly wrong -- in many respects. Moreover, it would be wholly inappropriate for the Commission to rely upon any of the newly filed information given that the parties to this proceeding have not been given public notice thereof or a meaningful opportunity to comment. Based on a cursory review in the limited time permitted, we cannot correct all the errors and misstatements at this time, but our failure to do so should not be taken as agreement with anything said by the MMTC in its *ex parte* filing. In this filing, we limit ourselves to showing that **the comments provide graphic confirmation that the Commission CANNOT require publicly available, station-attributed 395-B's without violating the central teaching of both *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 353, *rehearing denied*, 154 F.3d 487, *rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*") and *DC/MD/DE Broadcasters v. FCC*, 236 F.3d 13, 21, *reh'g &reh'g en banc denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S.Ct. 920 (2002) ("*Broadcasters*").**

In its filing, MMTC takes the position that any station that employs a number of minority employees that is lower by a statistical measure than the average number of minorities employed by broadcasters in its market is not merely engaging in discrimination (whether or not consciously) but may be presumed to be an "*intentional* discriminator." The MMTC further states that the Commission's proposed rules do not preclude claims based on statistical evidence of purported discrimination and indeed

cannot preclude such claims in light of supposedly controlling caselaw. The MMTC could hardly make it more clear that 395-B's will be examined to find stations whose reports show "underrepresentation" of minorities by a statistical test, and that petitions to deny will then be filed against the licenses of those stations on the ground that they are "intentional discriminators."[1]

These underrepresentation complaints will put stations under precisely the sort of illicit pressure to hire minorities that caused the court to find the EEO Rules unconstitutional in *Lutheran Church* and *Broadcasters*. In the face of the MMTC's petitions, rational broadcasters will surely be pressured into hiring minorities in sufficient numbers to meet the statistical test – tantamount to quotas -- so as to avoid petitions to deny and complaints, and the resulting investigations and threats to their licenses.

In *Lutheran Church,* 141 F.3d 344, the court of appeals held that the FCC's then-EEO rule was an unconstitutional race-based classification because it pressured broadcasters to hire employees based on race and could not survive strict scrutiny. And, in *Broadcasters*, 236 F.3d 13, the court of appeals held that the FCC's renewed attempt to regulate broadcasters' employment practices created pressure to recruit on the basis of race and was, therefore, also a race-based classification that violated the equal protection component of the Fifth Amendment's Due Process Clause. Both decisions were based on the *pressure* that the FCC is able to impose on its licensees, including *sub silentio* pressures and "raised eyebrow" regulation. *Broadcasters*, 236 F.3d at 19 (quoting *Community Service Broad. Of Mid-America, Inc. v. FCC*, 539 F.2d 1102, 1116 (D.C. Cir. 1978); *see generally Head v. New Mexico Bd. Of Exam'rs in Optometry*, 374 U.S. 424, 436-437 (1963) (quoting commentators stating the "licensing power of the FCC...hangs like a constant Damocles' sword over broadcasting" and that the FCC's informal powers resulted in "regulation of programming by raised eyebrow.") In *Lutheran Church*, the court explicitly commented on the dangers of a procedure that third-parties can use to put pressure on broadcasters to use racial classifications in hiring. 141 F.3d at 353. The Commission not only has a constitutional obligation to avoid pressuring broadcasters into

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[1] Alternatively, rather than petitions to deny, discrimination complaints could be filed in other forums and petitions to deny could be filed at the Commission based on the pendency of those complaints. The resulting violation of the rules of the teaching of *Lutheran Church* and *Broadcasters* would, however, be no different.

using quotas; the Commission also has an obligation to avoid establishing processes that third parties are likely to use to try to establish unconstitutional hiring quotas.

If the Commission were now to require public, station-attributed forms, the court would surely conclude that the Commission (a) ***knows*** the use to which such forms would be put, and (b) is -- at the very least -- acquiescing in the unconstitutional pressure that would thereby be created by third parties through underrepresentation complaints. Indeed, especially in light of the MMTC filing, the court would no doubt hold that the Commission was *facilitating* such pressure by requiring 395-B's. For this reason, and all the reasons stated earlier by the State Associations and others, the Commission should not and cannot require the 395-B's. If the Commission believes (incorrectly in our view) that it must conduct annual surveys of industry employment trends, it must do so by having a reputable, third party act as a clearing house for the aggregation of such data on an *anonymous*, non-attributable basis. Indeed, now Chief Judge Ginsburg questioned FCC counsel during oral argument in *Broadcasters* as to why the FCC could not use an independent third party to collect the employment statistics gathered via submission of Forms 395-B.

As the State Associations stated in their Joint Reply Comments, the Commission cannot lawfully sever consideration of these issues concerning 395-B's from the other issues in this proceeding. Such severance would be arbitrary and capricious because resolution of those issues is inextricably intertwined with the core issue of how, if at all, broadcasters' conduct should be regulated. Severance would be like saying: "Let's talk about what the rules should say but only later will we discuss how they should be implemented and enforced." Such an approach simply doesn't make sense and would, in any case, evade the key issue under dispute, which is the scope of the EEO obligations and the means by which such obligations are enforced. If the Commission is not prepared to resolve the 395-B issue now, it should postpone any action in this proceeding until it can deal with *all* relevant issues.

The State Associations have explained fully in their Joint Comments and Joint Reply Comments why it is not appropriate for the Commission to take further action in the area of EEO regulation. But if the Commission disagrees and insists on regulating, then, rather than seeking unlawfully to evade the core issue in this proceeding and the constitutional problems it raises, the Commission should do what is constitutionally required: reject requirements for publicly-available, station-attributed reporting because such requirements lead to unconstitutional pressure to recruit and hire based on race.

The State Associations also wish to advise the Commission that, contrary to the extended efforts by MMTC to justify and explain petitions to deny filed against routine broadcast renewals (as discussed in the testimony of Ann Arnold at the en banc hearing), Ms Arnold has advised us that she is confident in the correctness of her testimony concerning historic abuses of the Commission's policies. In addition, she questions whether MMTC's discussion of petitions filed by LULAC in fact relates to the particular instances of which she has been informed by member of her State Association.

Sincerely,

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